

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

GARY WAYNE GOODMAN,

Defendant - Appellant.

No. 04-30471

D.C. No. CR-03-00066-BLW-02

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted October 20, 2005^{**}
Seattle, Washington

Before: BRUNETTI and McKEOWN, Circuit Judges, and KING^{***}, Senior
Judge.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Gary Goodman appeals his sentence for twenty-six counts of health care fraud and conspiracy to commit health care fraud. Raising a preserved error under United States v. Booker, __ U.S. __, 125 S.Ct. 738, 756-57 (2005), Goodman contends that the district court erred in sentencing him by not considering evidence of his failing health under the advisory United States Sentencing Guidelines, 18 U.S.C. § 3553(a), and seeks a limited remand pursuant to our decision in United States v. Ameline, 409 F.3d 1073 (2005) (en banc).

We review preserved Booker error under the harmless error standard. United States v. Seschillie, 310 F.3d 1208, 1214 (9th Cir. 2002). Although the government bears the burden with respect to harm, United States v. Olano, 507 U.S. 725, 734 (1993), in most cases the determination of prejudice turns on an objective analysis of whether the error actually influenced the outcome of the case. Seschillie, 310 F.3d at 1214.

Under Ameline, we will remand to the district court cases involving remedial Booker error where the record provides an insufficient basis to determine whether the sentence would have been different but for the error. 409 F.3d at 1078; see also United States v. Moreno-Hernandez, 2005 U.S. App. LEXIS 17357 at 24 (9th Cir. 2005). Here, the record is sufficient to make that determination.

Defense counsel presented to the district court information regarding Goodman's health at the sentencing hearing. In explaining the different sentences for defendants Goodman and Heidi McBride, the court cited a range of factors it had considered. Although these factors did not include Goodman's health, the district court indicated that the sentences reflected the "totality of the circumstances." Finally, the district court provided several alternate sentences to reflect possible outcomes of the then-pending decision in Booker. Significantly, the district court followed this recitation by indicating that the sentence would be the same even without the Sentencing Guidelines. In these circumstances, the record is sufficient to conclude that remand is not in order.

AFFIRMED.